

In The
Supreme Court of the United States

October Term 1977

No.

77-1651

JAMES DOUGLAS MCMILLEN,

Petitioner,

vs.

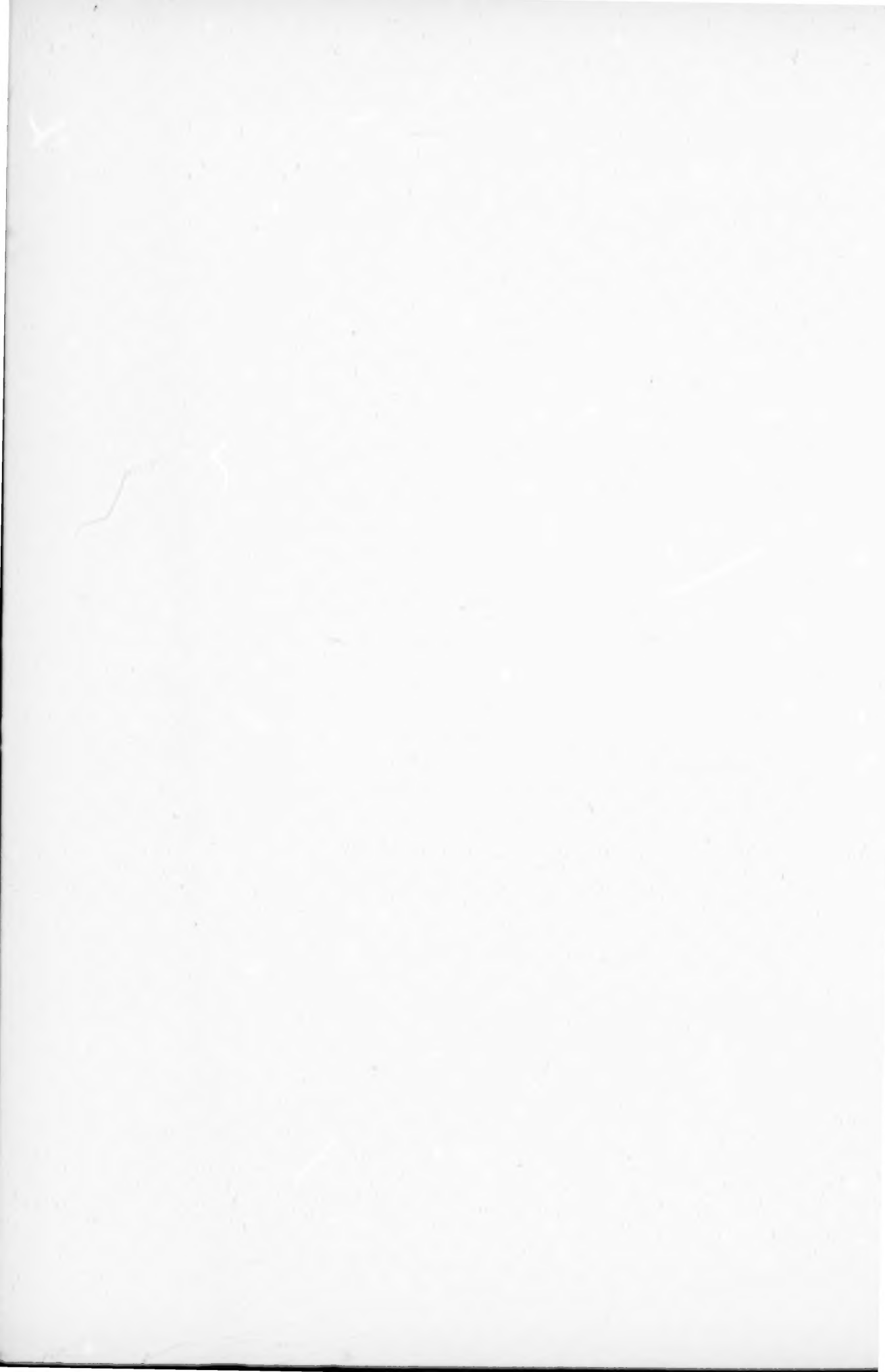
LOUIS J. LEFKOWITZ,

Attorney General of the
State of New York,

Respondent.

**PETITION FOR A WRIT OF MANDAMUS
TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK.**

James D. McMillen
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108
Petitioner



In The
Supreme Court of the United States

October Term 1977

No.

JAMES DOUGLAS MCMILLEN,
Petitioner,

vs.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Respondent.

**MOTION FOR LEAVE TO FILE A
PETITION FOR A WRIT OF MANDAMUS
TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK.**

TAKE NOTICE that upon the brief, papers and proceedings in this case, the undersigned will move this Court for an Order granting to the Movant, leave to file a petition for a writ of mandamus to Louis J. Lefkowitz, Attorney General of the State of New York, upon the grounds more fully set forth in the petition hereto attached, and for such other and further relief as to this Court may seem proper.

July 22, 1977

JAMES D. MCMILLEN
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108



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No.

JAMES DOUGLAS MCMILLEN,
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vs.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Respondent.

**PETITION FOR A WRIT OF MANDAMUS
TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK.**

Petitioner James Douglas McMillen respectfully prays that a writ of mandamus be issued to Louis J. Lefkowitz, Attorney General of the State of New York, commanding and directing that Louis J. Lefkowitz, Attorney General of the State of New York, forthwith return to the petitioner, all records of the petitioner, seized and in his possession on and since January 17, 1975; and further that this court grant such other and further relief as may be just in the premises.

JURISDICTION

Petitioner currently faces a criminal trial in the State Court System of the State of New York for which records sought herein are vital and without which, no fair defense can be had. Petitioner has sought within the State Court System to have the records be ordered to his possession. Courts of the State of New York have refused to rule on his application under a defense of "res judicata", advanced due to a pending 42 U.S.C. 1983 action, pending before the U.S. Court of Appeals for the Second Circuit. Petitioner has made application to the Second Circuit for a writ of mandamus and has been denied.

The immediate pendency of a criminal trial and the vital and essential need for the possession of the business records of the defendant to prepare his defense at trial, precludes further exploring the appeals system within the State of New York. Jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1651(a).

QUESTION PRESENTED

Can the Attorney General of the State of New York, continue to hold and possess records of the petitioner which were seized on January 17, 1975, without knowledge or forewarning to the owner, and deny the petitioner his records, while a criminal issue is before the courts wherein the petitioner must have his records to prepare a defense; due to a pending review of a 42 U.S.C. 1983 action.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Fifth Amendment to the Constitution of the United States:

"Nor shall any person . . . be deprived of life, liberty, or property, without due process of law"

Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

Fourteenth Amendment to the Constitution of the United States:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE FACTS

On January 17, 1975, agents of the Attorney General of the State of New York, unlawfully seized and took continuing possession of certain of petitioner's business and personal records. This action was executed without knowledge or warning to the petitioner, and was done in and through an instrument ostensibly purporting to be a subpoena duces tecum upon a third party, but was in fact, an unlawful instrument which seized petitioner's records. (Instrument/subpoena is attached herewith as Appendix A.)

Since January 17, 1975, the Attorney General of the State of New York has continued to possess and still does possess - now for a period of more than thirty months, these records of the petitioner, doing so against his will, and refusing to return them to him.

Currently the petitioner herein faces a criminal trial in the Schenectady County Court of New York, on charges relating to tax matters. Obvious then, because of the nature of the charges, is the need for the availability of business records to be able to prepare a fair and adequate defense by the defendant-petitioner to the charges.

After having been indicted in the Schenectady County Court on tax matters, the petitioner has sought to obtain possession of his own lawful property. Pursuant to the provisions of statutory law of the State of New York, on March 19, 1977, petitioner filed for a Declaratory Judgment in the Supreme Court of the State of New York, County of Albany, seeking a declaration that the original instrument was in itself unlawful, and further ordering that the unlawful subpoena be quashed and that the records be returned to the petitioner. (Attached herewith as Appendix B.)

Prior to the current indictment on tax matters (on August 27, 1975), petitioner herein had filed an action under 42 U.S.C. 1983, seeking damages from the Attorney General of the State of New York, from a "series" of invasions of his constitutional rights. Among a group of items presented was the subpoena referred to herein. It did not constitute plaintiff's case in itself, but was only one of a sequence of documents and actions, submitted as evidence. In the 42 U.S.C. 1983 action, plaintiff did not pray for the return of the records, but rather damages for unlawful acts.

Trial was held in the U.S. District Court for the Northern District of New York, and on November 19, 1976, plaintiff received an unfavorable directed verdict. This unfavorable directed verdict is currently under appeal to the U.S. Court of Appeals for the Second Circuit. Briefs have been filed and the case is awaiting assignment of a date for oral argument.

When on March 19, 1977, petitioner sought to obtain an order from the Supreme Court of the State of New York, Albany County, directing the return of his records (now vitally needed for a fair defense to the criminal trial), the Attorney General of the State of New York requested the court not to grant the petitioner's application, advancing a defense of "res judicata", alluding to the pending 42 U.S.C. 1983 action. In this instance then, the court therefore dismissed the petition.

Recognizing that the pending criminal trial was already now docketed on the "ready docket" for trial; traditional processes of appeal was not available to this petitioner within the Court systems of the State of New York. Additionally, the Attorney General of the State of New York had advanced a shield of res judicata, hiding behind the pending case before the U.S. Court of Appeals for the Second Circuit. Accordingly, petitioner herein filed a petition for a writ of mandamus in the U.S. Court of Appeals for the Second Circuit, setting forth that the pending appeal in no way precluded ordering the return of this petitioner's

records to him, and that they were urgently needed. On July 22, 1977, the U.S. Court of Appeals for the Second Circuit denied petitioner's application without comment.

At this point, the only available possible relief lies in the Supreme Court. There are no contested issues of fact in the matter. There is no question that the lawful owner of the records (of which there are many), is James D. McMillen. Further, there is no question that he is a defendant in a criminal tax trial now pending in the Schenectady County Court in New York. Further, there has been no question that the Attorney General has McMillen's records and that he obtained them in and through the instrument attached herewith as appendix A. Finally, there is no question as to his need for them on an immediate basis as he cannot be afforded any fair and just trial without access and possession of his own records, now illegally held for thirty months. Thus, this writ of mandamus sought is of urgent importance and must come from the Supreme Court.

REASON FOR GRANTING THE WRIT

PETITIONER'S APPLICATION TO THE SUPREME COURT FOR A WRIT OF MANDAMUS SHOULD BE GRANTED BECAUSE IT IS THE ONLY REASONABLE AND AVAILABLE MEANS OF AFFORDING HIM HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW.

At this point, we must consider what the issues involve. James D. McMillen is facing a criminal trial on tax matters in the Schenectady County Court, in the State of New York. More than two years ago, he found himself in a skirmish with the Attorney General of the State of New York concerning his business practices. At that time, (January 17, 1975), the Attorney General of the State of New York, under his own authority pursuant to Executive Law in the State of New York, issued a document which commanded a former secretary of McMillen to "forthwith produce and surrender" to the Attorney General of the State of New York, all business records and personal records of McMillen. It has been admitted that this was done without the knowledge of McMillen, forewarning or notice.

We cannot here ignore that this initial act was unlawful. Even a cursory examination of the document used (attached herewith as Appendix A) will show that it could not survive challenge, had challenge been available. It was executed only because it was done secretly and without the knowledge of McMillen. Testimony in previous trial will show that the person upon whom it was served was a collaborator with the Attorney General of the State of New York, and that she had told employees of McMillen that she had thrown the records out. Therefore, McMillen was without knowledge of the bogus subpoena which had taken his records and therefore, couldn't challenge it.

Then we must consider the pending 42 U.S.C. 1983 action, now before the U.S. Court of Appeals for the Second Circuit. This was an action seeking damages from a series of invasions of

the constitutional rights of McMillen. It is essential to realize that McMillen's action was founded upon several averments:

1. Accusations of harassment and duress.
2. Unlawful search of McMillen's business premises.
3. Unlawful seizure of certain of McMillen's property.

Emphatically it must be stressed to the court that the base of litigation was broader than the incident of the bogus subpoena used to seize his records. More importantly, the 42 U.S.C. 1983 action - filed on August 27, 1975, did not seek the return of the records; rather, damages from the unlawful acts.

With the above brief explanation of the pending case on appeal, it should be "removed" from the mind of the court and "forgotten". This is true for two reasons:

1. Regardless of the outcome on appeal, it will not dispose of the question of the records, nor will it order their return to McMillen.
2. Winning or losing a 42 U.S.C. 1983 action involves much more than the facts. To be successful a plaintiff must establish that the act was committed under color of state law; that it was an ultra vires act, outside the scope and duties of the responsibilities of the person committing the act; personal knowledge; malice, and further, the absence of "good faith belief".

The above then makes it apparent that alluding to a pending appeal in a 42 U.S.C. 1983 action offers no justification for a defense of "res judicata", when the action is one to dispose of the question of the records, and ordering their return to McMillen. Moreover, in McMillen's brief supporting his action to regain

possession of the records, he fully stressed to the court, that the questions were not logically dependent upon each other, and that the pending appeal was not dispositive of the question advanced before the court.

The results of the above must be viewed by the Court as a dilemma:

1. Can the criminal trial court continually postpone trial due to the unavailability of the records to McMillen, thus, despite McMillen being otherwise ready and demanding of trial. Does such continued postponement represent a denial of McMillen's entitlement to a "speedy trial" under the Fifth Amendment to the U.S. Constitution. Further, does holding a criminal trial in abeyance pending the entire appellate procedure in a 42 U.S.C. 1983 action, clearly deny McMillen's right to a speedy trial.
2. Can a pending appeal in a 42 U.S.C. 1983 action be used as a "shield" to defeat an action to correctly return records illegally seized via a bogus subpoena.

Clear then is the urgent need for the Supreme Court to grant this extra ordinary writ. McMillen faces a criminal trial which will either be endlessly postponed pending possible years of appellate exercise, thus denying him an opportunity to a speedy trial; or, in the alternative, he faces a criminal trial without any opportunity to an adequate and fair defense, and no opportunity to prepare a defense. Both of the above alternatives are intolerable and contrary to the rights of McMillen.

On the other hand, McMillen has exhausted all other reasonable remedies. He has sought action within the state court system in the State of New York, and being denied, has sought a writ

of mandamus from the Circuit Court for the Second Circuit. Here also his petition was denied. Accordingly, the only possible escape from the above dilemma rests in the Supreme Court of the United States, and short of its' immediate action, the rights of McMillen are automatically lost.

CONCLUSION

For the reasons urged herein, petitioner respectfully prays that a writ of mandamus be issued out of this honorable Court, directing and commanding the Honorable Louis J. Lefkowitz, Attorney General of the State of New York to forthwith return to petitioner, all records, papers, and documents taken by him on January 17, 1975; and that further, the Court grant to James D. McMillen such other and further relief as may be just in the premises.

Respectfully submitted,

JAMES D. MCMILLEN
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108

July 22, 1977

APPENDIX A

THE PEOPLE OF THE STATE OF NEW YORK

TO: SANDRA CADAN
• 1465 Lexington Ave.
Schenectady, New York

GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you produce forthwith and surrender to an agent of Louis J. Lefkowitz, Attorney General of the State of New York, all records, documents, papers, notes, memoranda, appointment books and materials of whatever kind and whatever nature relating to the business and affairs of either James D. McMillian and/or Therapeutic Hypnosis, Inc., a domestic corporation which is required in an inquiry by the Attorney General to determine whether an application should be made or an action should be instituted pursuant to subdivision 12 of section 63 of the Executive Law and which the Attorney General deems relevant and material to the inquiry. For a failure to produce the items herein specified, you will be liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and Fifty Dollars in addition thereto.

WITNESS, Honorable LOUIS J. LEFKOWITZ, Attorney General of the State of New York, the 17th day of January, 1975.

Assistant Attorney General

The witness is bound by this subpoena to appear at the trial, hearing or examination and at any adjourned date -
C.P.L.R.

APPENDIX B

STATE OF NEW YORK SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of
JAMES D. MCMILLEN,

Petitioner,

NOTICE OF
PETITION

For an Order and Declaratory Judgment
that LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

Respondent,

pursuant to section 3001 of the Civil Practice Laws and Rules, and pursuant to the provisions of the Constitution of the United States of America, Amendments IV and V; has, unlawfully inflicted upon the petitioner the abuse of unlawful search and seizure in and through the issuance of an illegal document which is unlawful and contrary to the constitutional rights of the petitioner; and that petitioner had certain personal and business property and records unlawfully seized and still in the possession of Louis J. Lefkowitz; and pursuant to section 2304 of the Civil Practice Laws and Rules, for an Order quashing said unlawful subpoena and further directing Louis J. Lefkowitz to return forthwith all materials thereby illegally seized.

S I R S:

PLEASE TAKE NOTICE that upon the petition, affidavit and supporting papers of James D. McMillen, verified the ____th day of March, 1977, an application will be made to this Court at Special Term, Part I thereof, to be held at the Albany County Courthouse in Albany, New York on the 11th day of April, 1977 at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for summary judgment, an Order and Declaratory Judgment granting the relief demanded in the petition.

DATED:

Yours, etc.

JAMES D. MCMILLEN
Petitioner Pro Se
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108

TO: LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Office & P.O. Address
The Capitol
Albany, New York 12224

(Signed and Dated)

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of
JAMES D. MCMILLEN,

Petitioner,

For an Order and Declaratory Judgment
that LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

PETITION

Respondent,

pursuant to section 3001 of the Civil Practice Laws and Rules, and pursuant to the provisions of the Constitution of the United States of America, Amendments IV and V; has, unlawfully inflicted upon the petitioner the abuse of unlawful search and seizure in and through the issuance of an illegal document which is unlawful and contrary to the constitutional rights of the petitioner; and that petitioner had certain personal and business property and records unlawfully seized and still in the possession of Louis J. Lefkowitz; and pursuant to section 2304 of the Civil Practice Laws and Rules, for an Order quashing said unlawful subpoena and further directing Louis J. Lefkowitz to return forthwith all materials thereby illegally seized.

James D. McMillen, appearing herein Pro Se, complaining of the respondent, alleges upon personal knowledge, information and belief:

AS AND FOR A FIRST CAUSE OF ACTION
AGAINST THE RESPONDENT LOUIS J.
LEFKOWITZ, ATTORNEY GENERAL OF
THE STATE OF NEW YORK.

FIRST: That the respondent Louis J. Lefkowitz is the Attorney General of the State of New York, an elected public official, whose principal office is located in the Capitol, in the City of Albany, County of Albany, New York.

SECOND: That the petitioner James D. McMillen is a resident of the State of Ohio, living in the City of Toledo, Ohio. Further that petitioner was formerly a resident of the State of New York, residing in the Town of Altamont, County of Albany, and operated and held business interests in the City of Schenectady, County of Schenectady, New York, as well as other locations across the State of New York.

THIRD: That during the month of January 1975, respondent was embarked upon an investigation of the personal and business activities of the petitioner; said investigation being in the lawful conduct of the duties and responsibilities of the elected position held by the respondent.

FOURTH: That on the date of January 17, 1975, respondent did issue an illegal document which was described in writing as a "subpoena" and described orally to its recipient as a "subpoena duces tecum".

FIFTH: That the aforementioned legal document commanded Mrs. Sandra Cadan, a former secretary of the petitioner whose employment had been terminated by the petitioner, to

produce and surrender to the Attorney General of the State of New York any records, business or personal, of petitioner James D. McMillen, or his business Therapeutic Hypnosis, Inc. (Note: a copy of the illegal document is attached as exhibit (1) to this petition.)

SIXTH: That pursuant to the illegal document the respondent did unlawfully seize certain records, books and properties of James D. McMillen.

SEVENTH: That the execution of the illegal document to seize the property of James D. McMillen was done without the knowledge of, or notice to James D. McMillen.

EIGHTH: That the illegal document issued was neither a subpoena nor a subpoena duces tecum; but rather, constituted an illegal and unlawful warrant of seizure.

AS AND FOR A SECOND CAUSE OF ACTION
AGAINST THE RESPONDENT LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE
STATE OF NEW YORK.

NINTH: That the execution of the illegal warrant of seizure is contrary to the laws of the State of New York and exceeded the statutory authority granted the Attorney General as well as his authority under Executive Law.

TENTH: That the execution of the illegal warrant of seizure has constituted an invasion against the constitutional rights of the petitioner under the Constitution of the United States of America.

AS AND FOR A THIRD CAUSE OF ACTION
AGAINST THE RESPONDENT LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE
STATE OF NEW YORK.

ELEVENTH: That the Attorney General of the State of New York has held, and still does hold, property and records illegally and unlawfully obtained by way of an illegal seizure warrant, which was executed as previously detailed.

TWELTH: That the continued impoundment and illegal possession of property of James D. McMillen, illegally obtained by way of an illegal and unlawful seizure warrant, is contrary to the rights of the petitioner.

THIRTEENTH: That a legal opinion as to the lawful sufficiency of the document used to obtain possession of the records is vital to the petitioner in the determination of possible recourse and possible damages.

WHEREFORE: petitioner prays that a judgment be granted:

- (a) Issuing a declaratory judgment that the document issued to obtain the records of James D. McMillen from Sandra A. Cadan, was not a lawful subpoena, or a subpoena duces tecum; but rather constituted an unlawful and illegal warrant of seizure, contrary to law and the authority of the Attorney General of the State of New York.
- (b) That the execution of the unlawful and illegal warrant has constituted an invasion of the constitutional rights of the petitioner.
- (c) That an Order be entered, quashing the document herein complained of, and declaring same to be null and void.
- (d) Issuing an Order to the Attorney General to return forthwith to James D. McMillen,

-7b-

any and all materials obtained as a result of
the execution of the illegal warrant of seizure.

DATED:

Respectfully submitted,

(Signed and Dated)

JAMES D. MCMILLEN
Petitioner Pro Se
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108

THE PEOPLE OF THE STATE OF NEW YORK

TO: SANDRA CADAN
1465 Lexington Ave.
Schenectady, New York

GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you produce forthwith and surrender to an agent of Louis J. Lefkowitz, Attorney General of the State of New York, all records, documents, papers, notes, memoranda, appointment books and materials of whatever kind and whatever nature relating to the business and affairs of either James D. McMillian and/or Therapeutic Hypnosis, Inc., a domestic corporation which is required in an inquiry by the Attorney General to determine whether an application should be made or an action should be instituted pursuant to subdivision 12 of section 63 of the Executive Law and which the Attorney General deems relevant and material to the inquiry. For a failure to produce the items herein specified, you will be liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and Fifty Dollars in addition thereto.

WITNESS, Honorable **LOUIS J. LEFKOWITZ**, Attorney General of the State of New York, the 17th day of January, 1975.

Assistant Attorney General

The witness is bound by this subpoena to appear at the trial, hearing or examination and at any adjourned date -
C.P.L.R.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of
JAMES D. MCMILLEN,

Petitioner,

For an Order and Declaratory Judgment
that LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

AFFIDAVIT

Respondent,

pursuant to section 2001 of the Civil Practice
Laws and Rules, and pursuant to the provisions
of the Constitution of the United States of
America, Amendments IV and V; has, unlawfully
inflicted upon the petitioner the abuse of unlaw-
ful search and seizure in and through the issuance
of an illegal document which is unlawful and con-
trary to the constitutional rights of the petitioner;
and that petitioner had certain personal and business
property and records unlawfully seized and still
in the possession of Louis J. Lefkowitz; and
pursuant to section 2304 of the Civil Practice Laws
and Rules, for an Order quashing said unlawful
subpoena and further directing Louis J. Lefkowitz
to return forthwith all materials thereby illegally
seized.

STATE OF OHIO)
COUNTY OF LUCAS) SS:

JAMES D. MCMILLEN, being duly sworn, deposes and says:

1. That he presently is a resident of the State of Ohio, living in the City of Toledo, County of Lucas, Ohio.

2. That during the period July 1972 through April 1975, he was a resident of the State of New York.

3. That during the aforementioned period of time, he offered a service of hypnosis to the public in the State of New York; initially as an individual doing business as Therapeutic Hypnosis, and subsequently through a corporation of which he was Chairman of the Board, its' Chief executive officer, and its incorporator. Further, that the corporation was organized under the laws of the State of New York and was incorporated under the name Therapeutic Hypnosis, Inc.

4. That during the period of October 1972 through January 1975, he did employ one Sandra A. Cadan as a personal secretary and receptionist; first in his personal practice and subsequently by the corporation he administered.

5. That in January 1975, affiant did fire Sandra Cadan, and did terminate her employment.

6. That on the final day of employment, officers of the corporation did confront Mrs. Cadan, seeking to have those business records she was responsible for maintaining.

7. That on that date Mrs. Cadan "lied" to the officers of the corporation by stating that she "had thrown them out".

8. That sworn testimony under oath in a criminal trial of the affiant (People v McMillen), conducted in the Schenectady County Court in November, 1975) indicated that in fact she had knowingly lied to the officers of the corporation about the records.

9. That the Attorney General of the State of New York did prepare a "document" and called it a "subpoena"; serving it upon Mrs. Cadan on January 17, 1975.

10. That an agent of the Attorney General's office, one John A. Neuberger, did serve the document on Mrs. Cadan on January 17, 1975, and did that day, take possession of "one large cardboard box" of records papers, and appointment books, of the affiant and affiants business both personal and corporate.

11. That all of the above acts were committed without the knowledge of or notice to James D. McMillen, the affiant herein.

12. That since January 17, 1975, the Attorney General has held the property illegally seized, and still does hold the property illegally seized.

13. That such a seizure of affiant's property was unlawful, illegal, and was an invasion of the constitutional rights of James D. McMillen.

DATED:

JAMES D. MCMILLEN

Sworn to and subscribed before me
this _____th day of March, 1977.

Notary Public
(Signed, Dated, Sealed and Stamped)

VERIFICATION

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

JAMES D. MCMILLEN, being duly sworn deposes and says that: he is the petitioner in the foregoing petition and is fully familiar with all the facts and circumstances therein.

Further, affiant avows that he has read the foregoing petition and that the statements contained therein are true to his own knowledge, information and belief.

JAMES D. MCMILLEN

Sworn to and subscribed before
me this _____th day of March, 1977.

(Signed, Dated, Sealed and Stamped)

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF ALBANY

X

In the Matter of the Application of
JAMES D. McMILLEN,

Petitioner,

For an Order and Declaratory Judgment that
LOUIS J. LEFKOWITZ, Attorney General of
the State of New York,

Respondent,

pursuant to section 3001 of the Civil Practice Laws and Rules, and pursuant to the provisions of the Constitution of the United States of America, Amendments IV and V; has, unlawfully inflicted upon the petitioner the abuse of unlawful search and seizure in and through the issuance of an illegal document which is unlawful and contrary to the constitutional rights of the petitioner; and that petitioner had certain personal and business property and records unlawfully seized and still in the possession of Louis J. Lefkowitz, and pursuant to section 2304 of the Civil Practice Law and Rules, for an Order quashing said unlawful subpoena and further directing Louis J. Lefkowitz to

return forthwith all materials thereby
illegally seized.

X

Albany County Special Term, April 22, 1977
Motion No. 67

Justice Robert C. Williams, presiding.

APPEARANCES: James D. McMillen, pro se.
 5325 Sanders Road
 Toledo, Ohio 43615

 Hon. Louis J. Lefkowitz,
 Attorney General.
 Michael F. Colligan, of Counsel.
 The Capitol, Albany, New York

WILLIAMS, J.

Petitioner proceeds by CPLR Article 78 for a judgment declaring that respondent has illegally seized certain of petitioner's business records and ordering respondent to return all of said records.

It appears that petitioner brought a civil rights action in Federal Court based on the same set of facts as alleged herein. The second and third causes of action in the Federal Court complaint contain substantially the same allegations as alleged in the petition herein. Petitioner has filed a notice of appeal to the Second Circuit Court of Appeals from an adverse verdict in District Court. Therefore, there being another action for similar relief pending and additionally, the principle of res judicata being

applicable, this proceeding may not be maintained.
CPLR 3211(a)(4)(5).

Accordingly, the petition is dismissed.

Submit judgment.

(All papers to Hon. Louis J. Lefkowitz, Michael F. Colli-
gan, of Counsel for submission of judgment and filing.)

Dated: May 13, 1977
Monticello, New York

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES D. MCMILLEN,

Petitioner,

vs

LOUIS J. LEFKOWITZ, Attorney
General of the State of New York,

PETITION FOR
WRIT OF MANDAMUS
Respondent.

Jurisdictional Statement

Jurisdiction comes in and through the pendency of an appeal currently before the U.S. Court of Appeals for the Second Circuit. In the instance of the cause of action contained in this petition for a Writ of Mandamus, the courts of the State of New York have declined to review the matter due to the pending appeal before this Second Circuit. The requested direction and enforcement of this Writ of Mandamus is essential and is sought on an immediate and urgent basis. Petitioner is unable to pursue normal channels of appeal, and requires immediate action upon his instant request to prevent serious, and irreparable damage to the petitioner.

Statement of the Action

Now comes JAMES D. MCMILLEN, and files this his petition for a Writ of Mandamus against the Honorable Louis J. Lefkowitz, Attorney General of the State of New York, and respectfully represents:

1. That on January 17, 1975, the respondent herein did take, seize and possess certain business and personal records of the petitioner.

2. That such action was committed pursuant to a document which was ostensibly alleged to be a subpoena duces tecum, but in fact lacked the essential ingredients to be a lawful subpoena duces tecum. A copy of said document is attached herewith as exhibit (1).

3. That the vehicular document commanded a third party to surrender records of this petitioner to the respondent. Further, that this act was executed without any knowledge, warning or notice to this petitioner, whose records were seized.

4. That since January 17, 1975, respondent has held, possessed, and still does possess the materials and records of the petitioner.

6. That circumstances of the seizure of these records and property of the petitioner, subsequently became one act of a series of acts complained of in and through an action filed against the respondent by the petitioner, under 42 U.S.C. 1983; wherein petitioner sought damages from a collected "series of acts" which were violative of petitioner's constitutional rights.

7. That on April 13, 1977, petitioner filed an action in the Supreme Court of the State of New York, for the County of Albany, seeking a Declaratory Judgment, and asking the court to hold the document of seizure to be unlawful and to quash same and to order and direct the respondent to return the seized records to the petitioner.

8. That the demands of the action filed in the Supreme Court of the State of New York were urgent, vital, and required immediate action by the court for the following reasons:

- a. That pursuant to a collateral action of the Attorney General of the State of New York, the petitioner now faces a criminal action and trial in the County Court of Schenectady County New York.
- b. That the charges of the criminal action involve allegations of tax evasion and the filing of and payment of taxes.
- c. That possession of business records by this petitioner is essential and vital to the preparation of a defense and any opportunity to a fair trial.
- d. That petitioner's property now seized and held by the respondent for twenty-nine months, prevents petitioner from preparing a defense to the action against him in the County Court.

9. By request of the respondent's answering papers in the action in the Supreme Court of the State of New York, the Honorable Robert C. Williams, dismissed petitioner's action seeking to recover the records and refused to review same, on the alleged defense of "res judicata" which contended that the court was prevented from reviewing the action due to the pending appeal on the 42 U.S.C. 1983 action, currently before the Second Circuit Court of Appeals.

10. That the principle of "res judicata" was incorrectly extended to the matter before the court for the following reasons:

- a. The pending 42 U.S.C. 1983 action did not seek an Order returning the records. The matter was a damage suit seeking resti-

tution for damages from a series of acts of which petitioner complained.

- b. The matter was and is, in no way dispositive of the question of the records - now in possession of the Attorney General of the State of New York.
- c. Success or failure on appeal in a 42 U.S.C. 1983 action involves questions other than regaining possession of the records.
- d. To succeed in such an action, a plaintiff must establish:
 - 1. Acting under Color of State Law.
 - 2. Ultra vires acts, outside the scope of duties and responsibilities.
 - 3. Malice.
 - 4. Personal knowledge and supervision.
 - 5. The absence of a "good faith-belief" defense.

(Note: In other words, a plaintiff in such an action may establish facts of an invasion of constitutional rights in such an action; but yet lose his case due to a successful defense of "good faith-belief").

11. That irrespective of all other questions and matters before any and all courts, the petitioner herein is unquestionably entitled to possession of his property.

12. That irrespective of any questions being reviewed by any courts, the petitioner must have his records returned to him, to allow a fair and just defense to the forthcoming criminal trial in which he is the defendant.

13. That any system of appeals is inadequate and time precludes such process. The pending criminal trial is scheduled for trial during the month of June, 1977. It therefore demands

the instant return of petitioner's records to him.

14. That the act of ordering the return of petitioner's records to him does not in itself, in any way alter, affect, or change the review of the Second Circuit, of the pending 42 U.S.C. 1983 action.

WHEREFORE: James D. McMillen, through the aid of this honorable Court, respectfully requesting, prays:

1. That a Writ of Mandamus be issued out of this honorable Court, directing and commanding the Honorable Louis J. Lefkowitz, Attorney General of the State of New York, to forthwith return to petitioner, all records, papers, and documents taken by him on January 17, 1975.

2. That the Court grant to James D. McMillen such other and further relief as may be just in the premises.

DATED:

(Signed and Dated)

JAMES D. MCMILLEN
Petitioner
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108

VERIFICATION

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

JAMES D. MCMILLEN, being duly sworn deposes and says that he is the petitioner in the above entitled action; that

he has read the foregoing petition and that to the best of his information and belief, the facts therein stated are true.

DATED:

JAMES D. MCMILLEN

Sworn to and subscribed before me
this _____ day of June, 1977.

Notary Public

AFFIDAVIT OF SERVICE

Undersigned certifies that the above petition was served upon the Respondent Louis J. Lefkowitz, by mailing a copy thereof to Louis J. Lefkowitz, Attorney General of the State of New York, The Capitol, Albany, New York (Michael Colligan of Counsel); doing same on June 8, 1977.

DATED:

JAMES D. MCMILLEN

(Signed, Dated, Sealed and Stamped)

THE PEOPLE OF THE STATE OF NEW YORK

TO: SANDRA CADAN
1465 Lexington Ave.
Schenectady, New York

GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you produce forthwith and surrender to an agent of Louis J. Lefkowitz, Attorney General of the State of New York, all records, documents, papers, notes, memoranda, appointment books and materials of whatever kind and whatever nature relating to the business and affairs of either James D. McMillian and/or Therapeutic Hypnosis, Inc., a domestic corporation which is required in an inquiry by the Attorney General to determine whether an application should be made or an action should be instituted pursuant to subdivision 12 of section 63 of the Executive Law and which the Attorney General deems relevant and material to the inquiry. For a failure to produce the items herein specified, you will be liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and Fifty Dollars in addition thereto.

WITNESS, Honorable **LOUIS J. LEFKOWITZ**, Attorney General of the State of New York, the 17th day of January, 1975.

Assistant Attorney General

The witness is bound by this subpoena to appear at the trial, hearing or examination and at any adjourned date -
C.P.L.R.

APPENDIX E

PRO SE
6/14/77
77-3038

UNITED STATES COURT OF APPEALS

Second Circuit

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of June, one thousand nine hundred and seventy-seven.

James D. McMillen,

Appellant,

v.

Louis Lefkowitz, Attorney General
of the State of New York,
Appellee.

A motion having been made herein by Appellant pro se for a writ of mandamus

Upon consideration thereof, it is
Ordered that said motion be and it hereby is denied.

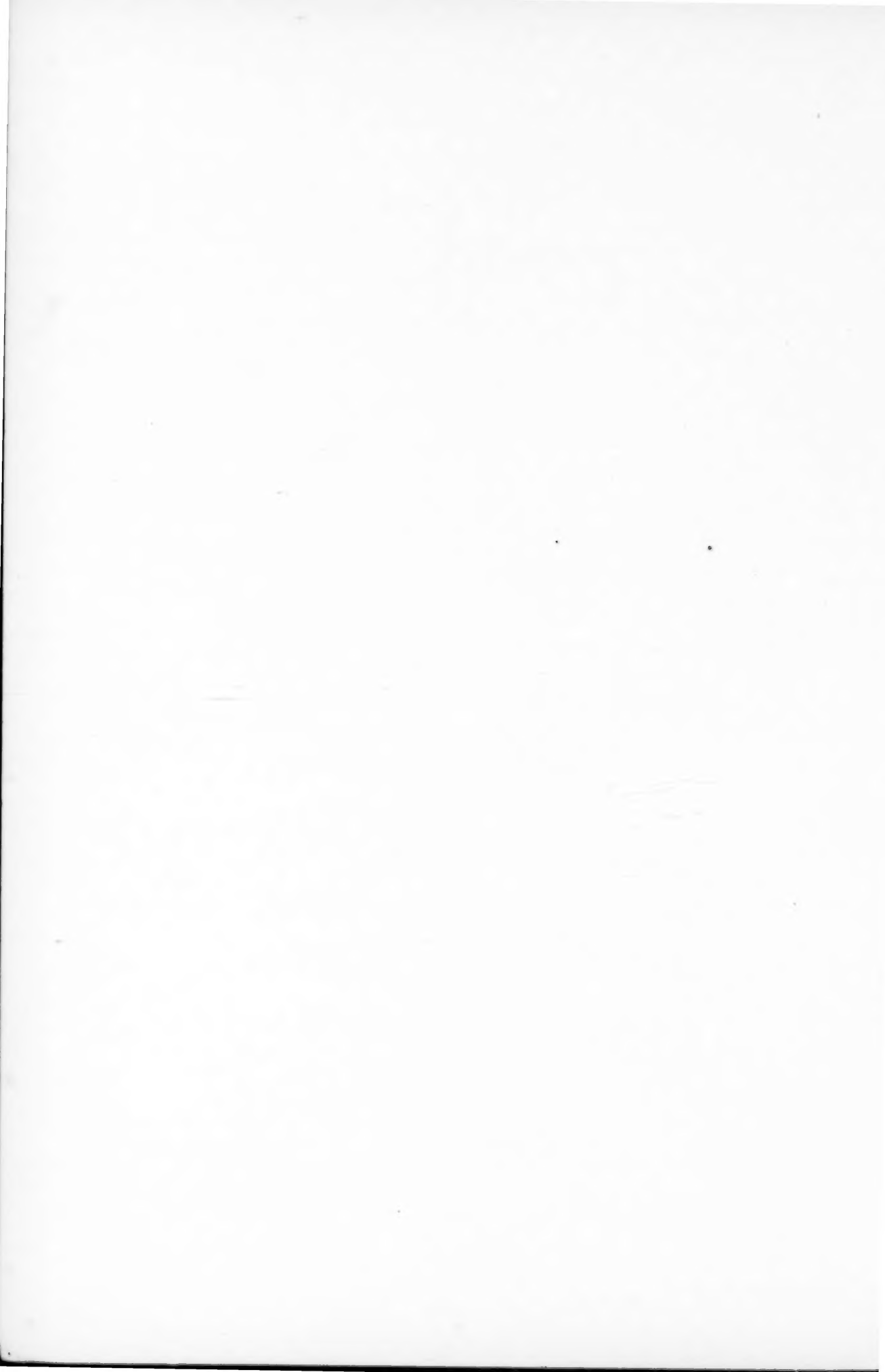
(Signed)

J. Joseph Smith

James L. Oakes

JLO JJS

Circuit Judges



Supreme Court, U. S.

FILED

SEP 26 1977

~~MICHAEL RUBIN, JR.~~ CLERK

In The
Supreme Court of the United States

October Term 1977

No. 77-165

JAMES DOUGLAS MCMILLEN,
Petitioner,
vs.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Respondent.

SUPPLEMENTAL BRIEF
ON
PETITION FOR WRIT OF MANDAMUS
TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK.

James D. McMillen
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108
Petitioner

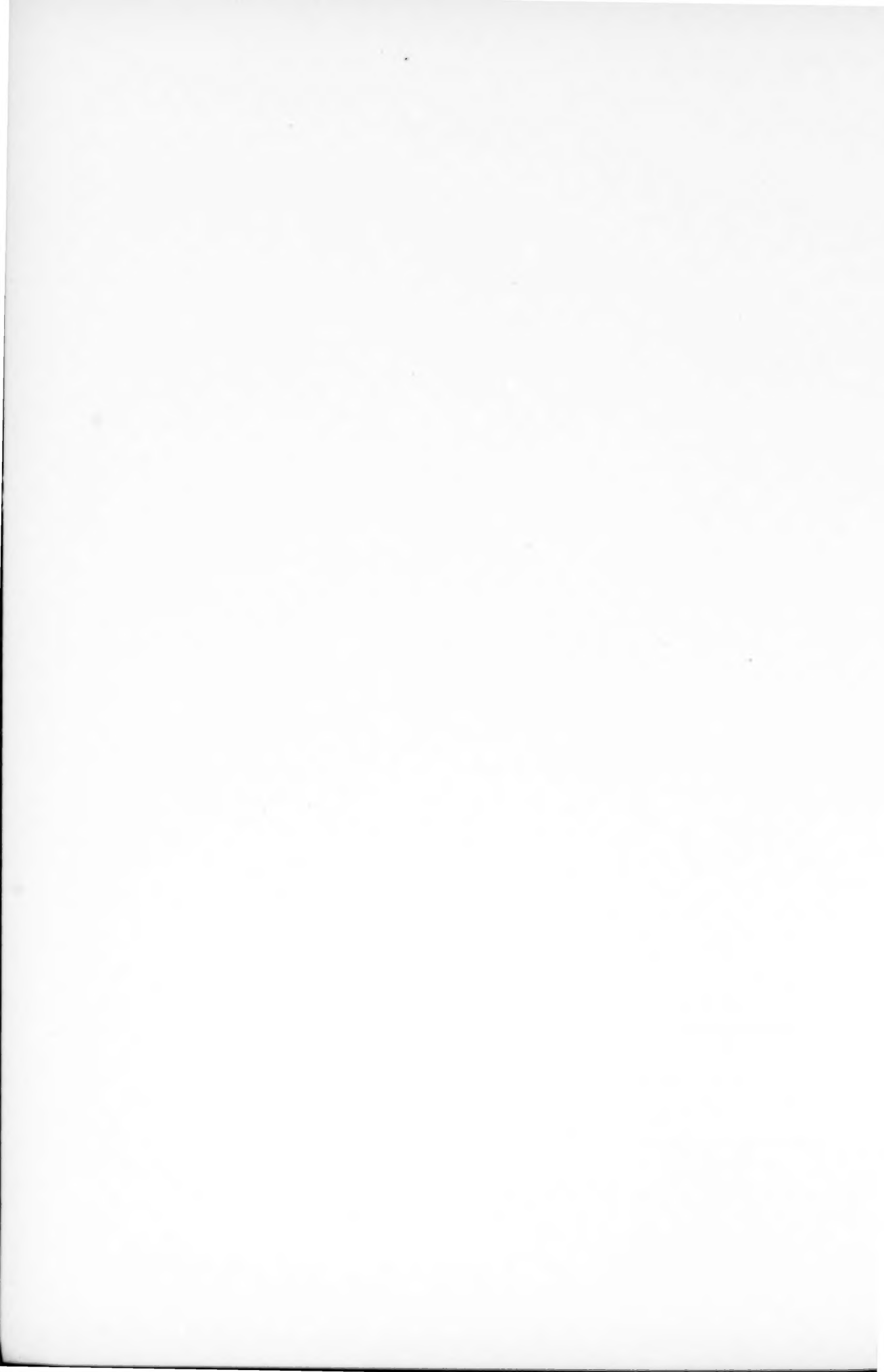


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In The
Supreme Court of the United States

October Term 1977

No. 77-165

JAMES DOUGLAS MCMILLEN,

Petitioner,

vs.

**LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,**

Respondent.

**SUPPLEMENTAL BRIEF
ON
PETITION FOR WRIT OF MANDAMUS
TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK.**

CONTROVERSY ON JURISDICTION

It is both crucial and critical to understand that respondent, in challenging jurisdiction of the court to issue this writ of mandamus, camouflages and seeks to conceal the question of a pending criminal trial.

In lengthy discourse, respondent has cited a history of facts relative to civil cases at various stages in appellate procedure. Petitioner originally set forth that the state of any civil cases must be removed from the mind of the court.

Cogently stated, the issue is that the respondent seized in 1975, a large number of petitioner's business records. Since that time, respondent has continued to hold and possess these seized records; allegedly doing so because of pending civil litigation which has already been tried, and is now awaiting appellate review.

Totally independent of these civil matters, the petitioner currently faces a criminal trial on tax matters in Schenectady, New York. The criminal trial on tax charges deals with a period of time concurrent to the records seized admittedly for civil litigation. Possession of petitioner's own personal records is imperative to any possible fair defense at trial.

Jurisdiction for this court to issue a writ of mandamus therefore comes from the emergency need of this court to protect the petitioner's constitutional rights in the criminal trial. The question "looms" before this court to seek an answer to a dilemma:

1. Must McMillen, the petitioner, endure endless postponements of the criminal trial while appellate exercise of civil cases takes place, thus denying him his constitutional right to a speedy trial under the Sixth Amendment to the Constitution, or;

2. Must petitioner McMillen go forward in a criminal trial without a fair defense by access to his records?

It is in the above dilemma that jurisdiction is found. McMillen sought relief from the state courts in New York and was denied. In this action, the respondent shielded himself behind a pending appeal in the U.S. Second Circuit - alleging a defense of "res judicata". Because the defense of res judicata was to the U.S. Second Circuit, McMillen went to the U.S. Second Circuit seeking a writ of mandamus and was denied.

The criminal trial docket indicates the criminal case "should be tried". McMillen needs immediate relief and has exhausted all other reasonable sources. Accordingly, the Supreme Court of the United States must act to preserve the constitutional rights of McMillen in the current criminal trial.

SUPPORTING CONSIDERATIONS

Initially it is noteworthy to understand that in the criminal tax case awaiting trial in Schenectady, New York, that the prosecution is being handled by "The Attorney General of the State of New York". *RATHER THAN* by the local district attorney. Thus, the prosecutor in the tax case is the same entity as the respondent to this petition for a writ of mandamus.

In reading respondent's brief, the court will note that at no time did the respondent suggest or even "*hint*" that he wished to continue to possess petitioner's records to be used as evidence or assist him in the prosecution of the criminal trial. Rather, he prays permission to continue to hold these seized records "due to pending civil litigation" which admittedly has already passed through trial and is only undergoing appellate review. There is an immediate conclusion which emanates from the above:

1. The seized records have no current, active, value to the Attorney General of the State of New York. He admits he continues to hold them only in fear that an appellate court might overturn an existing verdict (now in his favor), and he might be forced back again to trial.

2. While there is no current active value in the records to the Attorney General of the State of New York, it is apparent that, withholding them from McMillen, harasses him. Again, McMillen is his direct adversary in the forthcoming tax trial. Moreover, it precludes McMillen's opportunity to prepare a fair defense at trial against his adversary.

3. The above is grossly abusive of both justice and McMillen's constitutional rights.

Only remaining then is the shallow assertion of the respondent that he would permit petitioner to see, examine and photocopy petitioner's own records. This is initially greatly misleading inasmuch as many of the items cannot be photocopied. They represent books, cassette tapes, and a variety of items which cannot be copied. Moreover, it should be realized that this petitioner

(defendant in criminal trial) lives and resides in Toledo, Ohio. The materials are located in Albany, New York, and the trial will occur in Schenectady, New York. Preparation for a 42 count grand jury indictment on tax matters involves "far more" than a simple visit to Albany, New York to "see" his own records. Such an idea is totally ridiculous and without merit.

In essence then, the issue and the question solely turns upon the emergency need of the Supreme Court to protect the constitutional rights of McMillen.

CONCLUSION

For the reasons set forth in the petition and as supplemented in this brief, petitioner respectfully prays that a writ of mandamus be issued out of this honorable Court, directing and commanding the Honorable Louis J. Lefkowitz, Attorney General of the State of New York to forthwith return to petitioner, all records, papers, and documents taken by him on January 17, 1975; and that further, the Court grant to James D. McMillen such other and further relief as may be just in the premises.

Respectfully submitted,

JAMES D. MCMILLEN
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108

Dated: September 23, 1977

OCT 6 1977

MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

October Term 1977

No. 77-165

JAMES DOUGLAS MCMILLEN,
Petitioner,

vs.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Respondent.

SECOND
SUPPLEMENTAL BRIEF
ON
PETITION FOR WRIT OF MANDAMUS
TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK.

James D. McMillen
5325 Sanders Road
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In The
Supreme Court of the United States

October Term 1977

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JAMES DOUGLAS MCMILLEN,

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SECOND
SUPPLEMENTAL BRIEF
ON
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TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK.

"A RECENT DECISION"

Subsequent to the filing of this petition, two companion cases have been reviewed by the Court of Appeals of the State

of New York. In these two decisions, the New York Court of Appeals issued definitive case law which should govern the matter in question herein.

1. A subpoena cannot be used as authorization to "take possession" of records, property, etc.
2. The act of seizing and holding this petitioner's records is contrary to the authority granted the Attorney General of the State of New York pursuant to Executive Law.
3. "Res judicata" is no defense and pending civil litigation cannot serve to justify taking possession and holding records obtained through a subpoena.

The above three principles are clearly set forth in the cases. The cases were reported in the New York Law Digest, No. 213. The appropriate excerpts are herein quoted:

"However, the authorization to conduct an inquiry and issue subpoenas is not an authorization to take possession of books and records for examination and audit. Section 63, subd. 8, of the Executive Law did not authorize the Special Prosecutor to retain custody of the documents". (Matter of Windsor Park Nursing Home v Hynes, _____ N.Y.2d_____) (July 7, 1977) (N.Y.S. Law Digest, No. 213).

"It did not authorize the seizure, impoundment or other disruption in possession of records or property. It was improper for the court to give the prosecutor unsupervised possession of the witness' books and records on the basis of the subpoena alone. If the circumstances warranted impoundment or other lawful interference with possession of records or property, authorization for the imposition of

such a condition must be grounded on powers and procedures not inherent in the subpoena.... Impoundment is a measure so drastic that it must be exercised by or solely on behalf of a court itself." (Heisler v Hynes, _____N.Y.2d_____) (July 7, 1977) (N.Y.S. Law Digest No. 213).

CONCLUSION

The above two quoted cases from the N.Y. Court of Appeals, totally destroys the attempted defense set forth in respondents brief herein. There is no defense to petitioner's claim that the Attorney General holds petitioner's records illegally. Moreover, returning to the more important issue, petitioner faces a criminal trial without these records which are vital to him. He has sought relief in the State Courts of the State of New York and has been denied. McMillen's claim of jurisdiction in the Supreme Court remains valid that it is urgent and necessary to protect his constitutional rights to a speedy and fair criminal trial. Accordingly, the writ should be granted.

Respectfully submitted,

James D. McMillen
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108

Dated: October 5, 1977

[H-125]

Supreme Court, U. S.
FILED

SEP 14 1977

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-165

JAMES DOUGLAS MCMILLEN,

Petitioner,

— vs. —

LOUIS J. LEFKOWITZ, Attorney General of the State of
New York,

Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS**

LOUIS J. LEFKOWITZ
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of New York
Attorney for Respondent
The Capitol
Albany, New York 12224
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Solicitor General of the State
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MICHAEL F. COLLIGAN
Assistant Attorney General of
the State of New York
of Counsel



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In The
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-165

JAMES DOUGLAS MCMILLEN,

Petitioner,

— vs. —

LOUIS J. LEFKOWITZ, Attorney General of the State of
New York,

Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS**

Opinions Below

There is no ruling by a court below which petitioner seeks to review directly in his petition. Petitioner has, however, made similar applications for writs of mandamus to two courts below.

Petitioner first applied for a writ of mandamus from the New York State Supreme Court, Albany County. This application was denied by that Court (WILLIAMS, J.) on the grounds that petitioner was barred by the doctrine of *res judicata* from litigating questions that he had already litigated in an action in the United States District Court for the Northern District of New York. Petitioner took no appeal from that judgment dismissing his petition.*

*Decision is set forth in the Appendix to this brief.

The petitioner then applied directly to the United States Court of Appeals for the Second Circuit for a writ of mandamus. That Court denied petitioner's application.

Question Presented

Is there jurisdiction to grant a writ of mandamus, where the writ is not sought as ancillary relief and where the petition does not present a substantial Federal question?

Statement of the Case

Petitioner seeks a writ of mandamus from this Court against the Attorney General of the State of New York requiring the Attorney General to turn certain records over to the petitioner. The records petitioner seeks to have returned were acquired by the Attorney General during an investigation in the discharge of his statutory duties [N.Y. Executive Law Sec. 63 (12)]*. The investigation centered on fraudulent and illegal business activities engaged in by the petitioner and two corporations he was closely associated with. As a result of this investigation, criminal charges were brought against petitioner and a civil proceeding for a permanent injunction was commenced against the petitioner and the two corporations.

The petitioner was acquitted of the criminal charges; but a civil injunction was issued against the petitioner and the two corporations permanently enjoining and restraining them from engaging in fraudulent and criminal business activities in the State of New York*.

*Text of this section is set forth in the Appendix to this brief.

*The petitioner appealed this injunction to the New York Appellate Division, Third Department, which affirmed (*Lefkowitz v. Therapeutic Hypnosis, Inc.*, ____ A D 2d ____ [May 5, 1977]). (A copy of the decision is annexed in the Appendix.) Petitioner then moved for leave to appeal to the New York Court of Appeals. Petitioner's motion was denied September 1, 1977 (a copy of the order is in the Appendix).

The petitioner also commenced a civil action (pursuant to 42 U.S.C. 1983) in the United States District Court for the Northern District of New York against the Attorney General alleging a violation of his constitutional rights. After four days of trial, a directed verdict was granted by the Court (FOLEY, J.) dismissing the complaint. An appeal by petitioner is pending in the United States Court of Appeals for the Second Circuit.

In March of 1977 the petitioner also commenced a proceeding pursuant to New York Civil Practice Law and Rules, Article 78 against the Attorney General. Among other things, petitioner sought a declaration that a subpoena issued to a Sandra Cadan, an employee of one of petitioner's corporations, in January 1975 was illegal and requiring that the books and records produced by Mrs. Cadan in compliance with the subpoena be returned to petitioner. The Court dismissed the petition holding that petitioner was barred by the doctrine of *res judicata* from relitigating matters already litigated. Petitioner took no appeal from the judgment dismissing this proceeding and his time to appeal has expired*.

The petitioner then filed a petition for a writ of mandamus against the Attorney General with the United States Court of Appeals for the Second Circuit. This petition was summarily denied.

The records that petitioner seeks to have returned are being retained because of the cases which are still open and pending.

The petitioner has been told that these records are available for his use and copying at the Attorney General's office. To date petitioner has not attempted to make use of these records.

*New York Civil Practice Law and Rules Sec. 5701(a)(1) text of this section is set forth in the Appendix to this brief.

ARGUMENT

THE PETITIONER DOES NOT REQUEST RELIEF WITHIN THE JURISDICTION OF THIS COURT. HIS PETITION IS FRIVOLOUS AND WITHOUT MERIT AND SHOULD BE DENIED.

The petitioner does not request the extraordinary writ of mandamus as ancillary relief to this Court's appellate jurisdiction. The petitioner, rather, seeks this writ as his ultimate relief, thus attempting to invoke the original jurisdiction by this Court. Petitioner, however, does not come within any of the limited areas where this Court's original jurisdiction may be invoked. Accordingly, his petition should be denied.

Moreover, his petition should not be treated as one for a writ of certiorari because the petition does not present an order or judgment from any Court below that is reviewable or warrants review. The judgment by the New York State Supreme Court, Albany County, is not from the highest New York State court in which a decision could be had. Petitioner could have appealed that judgment to the Appellate Division of the New York State Supreme Court, but he did not and his time to appeal has since run*.

The order by the United States Court of Appeals for the Second Circuit denying petitioner's motion for a writ of mandamus does not warrant review. There is no original jurisdiction in the United States Court of Appeals to issue a writ of mandamus. In addition, petitioner's allegations that his property rights have been violated are wholly insubstantial, without merit and frivolous.

*New York Civil Practice Law and Rules Sec. 5513(a) (set forth in the Appendix to this brief) provides that an appeal must be taken within 30 days from service of the judgment. The judgment was served on petitioner on June 23, 1977.

The records that petitioner seeks to have returned were turned over to the Attorney General's office by the custodian of those records pursuant to a subpoena in the course of an investigation mandated by statute into the fraudulent and illegal business activities of the petitioner.

The information developed from this investigation has resulted in petitioner being enjoined by the Supreme Court of the State of New York from engaging in fraudulent and illegal business practices in the State.

Petitioner has not been denied access to these records, but rather has been told that he may inspect and copy these records. Petitioner has made no attempt to use these records, although he has been in the State of New York several times in the last few months.

Petitioner has also been told that once all litigation is finally terminated and the Attorney General's office has no further need for the records in the Courts they will be returned to the rightful owner.

CONCLUSION

**THE PETITION FOR A WRIT OF MANDAMUS
SHOULD BE DENIED.**

Dated: September 12, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondent

RUTH KESSLER TOCH
Solicitor General of the State
of New York

MICHAEL F. COLLIGAN
Assistant Attorney General of
the State of New York

of Counsel

APPENDIX



STATUTE — New York Executive Law Sec. 63(12).**New York Executive Law Sec. 63(12)**

"12. Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word 'fraud' or 'fraudulent' as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretence, false promise or unconscionable contractual provisions. The term 'persistent fraud' or 'illegality' as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct.

"In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules."

**STATUTE — New York Civil Practice Law and Rules
Sec. 5513(a).**

New York Civil Practice Law and Rules

**“Sec. 5513. Time to take appeal, cross-appeal or move
for permission to appeal.**

(a) Time to take appeal as of right. An appeal as of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, his appeal must be taken within thirty days thereof.”

**STATUTE — New York Civil Practice Law and Rules
Sec. 5701(a)(1).**

**“Sec. 5701. Appeals to appellate division from supreme
and county courts.**

**(a) Appeals as of right. An appeal may be taken to
the appellate division as of right in an action, originating
in the supreme court or a county court:**

**1. from any final or interlocutory judgment except
one entered subsequent to an order of the appellate divi-
sion which disposes of all the issues in the action; or**

*** * * ”**

DECISION by New York State Supreme Court Appellate Division, Third Department, in Matter of Louis J. Lefkowitz v. James D. McMillen and Therapeutic Hypnosis, Inc. .

Supreme Court — Appellate Division
Third Judicial Department

May 5, 1977.

30500

In the Matter of LOUIS J. LEFKOWITZ, as Attorney
General of the State of New York, Respondent,

v.

JAMES D. McMILLEN, Appellant,
and

THERAPEUTIC HYPNOSIS, INC., et al., Respondents.

Appeal from a judgment of the Supreme Court at Special Term, entered November 21, 1976 in Albany County, which granted summary relief in favor of petitioner.

The nature and factual background of this proceeding is set forth in our decision of a prior appeal in which summary judgment against two corporations and an individual respondent was reversed with leave granted to answer the petition (*Matter of Lefkowitz v. Therapeutic Hypnosis*, 52 A D 2d 1017). Such answers were timely served, but Special Term has once again resolved the matter in a summary fashion in petitioner's favor. This time, however, only the individual respondent, James D. McMillen, has appealed from its judgment. We have examined the contentions urged by him and conclude that they lack merit.

CPLR 409 (subd. [b]) requires the court to make a summary determination of a special proceeding to the extent that the pleadings and papers raise no triable issues of fact and the same test and standards used when disposing of a motion for summary judgment in an action apply in resolving that question (*Matter of Javarone [De Rizzo]*, 49 A D 2d 788). Here, the petition and related documentation contained sufficient allegations of fact to merit the relief sought and triable issues

DECISION by New York State Supreme Court Appellate Division, Third Department, in Matter of Louis J. Lefkowitz v. James D. McMillen and Therapeutic Hypnosis, Inc. .

were not raised by the general denials of McMillen's answer (see *Iandoli v. Lange*, 35 A D 2d 793). We find nothing in the statute mandating that a supporting affidavit be annexed to the answer (CPLR 403, subd. [b]) and, since his was apparently served at least one day before the return date, Special Term incorrectly rejected it as being untimely. Nevertheless, the error in this regard may safely be ignored for it further appears that Special Term did consider the matters stated in that affidavit in arriving at its decision and, in any event, we have fully entertained them without discovering any reason to disturb its ultimate determination. The burden was on McMillen to reveal his proofs and show that his defenses were real and capable of being established. The conclusory assertions recited in that affidavit, even if believable, were simply not enough to meet that burden (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N Y 2d 255; *Holdridge v. Town of Burlington*, 32 A D 2d 581).

Judgment affirmed, without costs.

KOREMAN, P.J., GREENBLOTT, KANE, MAIN and HERLIHY, JJ., concur.

ORDER by New York State Court of Appeals Denying Petitioner's Motion for Leave to Appeal in Matter of Louis J. Lefkowitz v. James D. McMillen and Therapeutic Hypnosis, Inc. .

State of New York,
Court of Appeals

*At a session of the Court, held at Court
of Appeals Hall in the City of Al-
bany on the first day
of September A. D. 1977*

Present, HON. CHARLES D. BREITEL, *Chief Judge*, presiding.

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Mo. No. 649

In the Matter of
the Application of the People &c. by Louis J.
Lefkowitz, Attorney General of the State of
New York, Respondent,
for an Order enjoining and restraining
Therapeutic Hypnosis, Inc., James D. McMillen
& ors., individually and as incorporators,
officers and directors of Therapeutic Hypnosis,
Inc., National Institute of Hypnosis Practices,
Inc., et al., Appellants,
pursuant to Art. 5, Sec. 63, subd. 12 of the
Executive Law, &c.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

(SEAL)

s/ JOSEPH W. BELLACOSA

Joseph W. Bellacosa
Clerk of the Court